

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

Expresstrak, L.L.C.,

Debtor.

Case No. 03-67235

Chapter 11

Hon. Phillip J. Shefferly

**OPINION GRANTING IN PART AND DENYING IN PART
THE DEBTOR'S MOTION FOR
EXTENSION OF TIME WITHIN WHICH THE DEBTOR HAS
THE EXCLUSIVE RIGHT TO FILE A PLAN AND OBTAIN
CONFIRMATION OF A PLAN PURSUANT TO
SECTION 1121(d) OF THE BANKRUPTCY CODE**

I. Introduction

This opinion addresses the Chapter 11 Debtor's request to extend the exclusive period in which to file its Chapter 11 plan of reorganization and obtain confirmation of its plan under § 1121(d) of the Bankruptcy Code. Because this is a Chapter 11 case that was filed prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the Debtor's motion is governed by the provisions of § 1121(d) of the Bankruptcy Code as it existed prior to BAPCPA. A hearing on the Debtor's motion was held on July 31, 2006. The Court took the motion under advisement at that time. For the reasons set forth in this opinion, the Court has determined to grant in part and deny in part the Debtor's motion for extension of time in which the Debtor has the exclusive right to file a plan and the time in which the Debtor may obtain confirmation of that plan.

II. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L).

III. Facts

On June 2, 2006, the Debtor filed a motion for an order granting a tenth extension of time in which the Debtor has the exclusive right to file a plan and the time in which the Debtor may obtain confirmation of its plan under § 1121(d) of the Bankruptcy Code. The fact that the Debtor's motion requests a *tenth* extension of exclusivity by itself suggests the unusual nature of this case and compels a review of its history. The facts are not in dispute and many of them have been recited by the Court in other opinions issued in this case. The following are pertinent undisputed facts.

On October 27, 1999, after approximately three years of negotiations, the Debtor and National Railroad Passenger Corp. ("Amtrak") executed an Operating Agreement ("Operating Agreement") that provided for the transportation of perishable goods (fruits, vegetables, meat, cheese, and other food products) in temperature-controlled railcars, which were to be attached to Amtrak's inter-city passenger trains. Under the Operating Agreement, which envisioned the use of up to 350 such cars, the Debtor committed to acquiring railcar "hulks" that would be refurbished to Amtrak's standards. The Operating Agreement contemplated that the Debtor would cause the refurbished railcars to be conveyed to a third party lessor who, in turn, would lease the railcars to Amtrak, and Amtrak would then sublease them to the Debtor. Pursuant to this arrangement, Amtrak would make the lease payments to the third party lessor and the Debtor would simultaneously pay an equal amount to Amtrak under the sublease.

After the Operating Agreement was finalized, Orix Financial Services, acting as a third party lessor, agreed to purchase 110 railcars and, on May 15, 2001, Orix executed a lease with Amtrak that required Orix to lease these cars to Amtrak. On the same day, Amtrak entered into a Sublease ("Sublease") with the Debtor in which Amtrak agreed to sublease the 110 cars to the Debtor. In

November, 2001, after financing 55 of the 110 cars, Orix suspended its funding. Amtrak and the Debtor subsequently entered into a letter agreement (“Direct Lease”) on November 30, 2001, whereby Amtrak agreed to purchase the 55 remaining railcars from the refurbishing vendor, and lease them to the Debtor. The letter agreement stated that: “Under the Direct Lease, Amtrak and Expresstrak shall have substantially the same rights and obligations with respect to the railcars made subject thereto as each currently holds with respect to the railcars subject to the Sublease” Although the parties contemplated executing a more formal document, they never did.

By letters dated April 15, 2002, Amtrak informed the Debtor that because the Debtor had failed to make its January and April, 2002 payments, it was in default under the Sublease and the Direct Lease (collectively, the “Leases”) and, therefore, Amtrak was terminating the Leases. Amtrak also demanded return of all express cars leased to the Debtor under the Leases. The Debtor paid Amtrak the overdue amounts on April 17, 2002 and, by letter of April 25, 2002, denied that it had defaulted under the Leases. The Debtor asserted that the April 15, 2002 notice of default was “ineffective and unenforceable,” that Amtrak could not unilaterally “demand return of the express cars,” and that Amtrak had “defaulted on numerous obligations under [the] amended operating agreement.” In an attempt to resolve their differences, the parties operated under a standstill agreement from May 3, 2002 to September 8, 2002. Under the standstill agreement, Amtrak continued to run the express cars with the Debtor’s freight.

On September 9, 2002, Amtrak filed suit against the Debtor in the District Court for the District of Columbia (“District Court”), alleging that the Debtor had defaulted under the Leases when it failed to make timely payments, and seeking declaratory relief and damages. In response, the Debtor made a demand for arbitration, and moved for a stay of the litigation pending arbitration

and an order compelling Amtrak to continue conducting business. The Debtor based this demand upon a provision in the Operating Agreement that required the parties to submit their disputes to arbitration. On October 15, 2002, the Debtor filed a separate suit against Amtrak in the District Court seeking injunctive relief and an order compelling arbitration. The District Court consolidated the two lawsuits. On December 5, 2002, the District Court ruled that the dispute resolution provisions of the Operating Agreement governed the parties' dispute. The District Court then stayed the lawsuit and directed the parties to submit their disputes to arbitration. At the same time, the District Court entered an order requiring the parties to continue to conduct business while such arbitration proceedings were pending.

On January 27, 2003, the District Court heard testimony regarding alleged damages that Amtrak would suffer as a result of the injunction that had been entered. Based upon the testimony, the District Court ordered the Debtor to post a bond by February 15, 2003. On June 6, 2003, on expedited appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's order compelling arbitration and found that the default and remedy provisions contained in the Leases superceded the arbitration provisions of the earlier executed Operating Agreement. National Railroad Passenger Corp. v. Expresstrak, L.L.C., 330 F.3d 523, 530-31 (D.C. Cir. 2003). The Court of Appeals further found that the dispute between Amtrak and the Debtor was not properly arbitrable. Id. at 531. As a result, the Court of Appeals reversed both the order compelling arbitration as well as the injunction, and remanded the case to the District Court for trial on the parties' breach of contract and other claims.

After the ruling by the Court of Appeals, Amtrak notified the Debtor in writing on June 25, 2003 that it would no longer accept for movement any loads tendered by the Debtor on the 55

railcars that were the subject of the Sublease. On September 16, 2003, Amtrak sent a similar notification regarding the railcars leased pursuant to the Direct Lease. On September 15, 2003, Amtrak filed its first amended complaint in the District Court. On September 25, 2003, the Debtor filed its answer and counterclaim to the first amended complaint. On October 3, 2003, the Debtor filed a voluntary petition for relief under Chapter 11 in this Bankruptcy Court. At the time of the commencement of the bankruptcy case, Amtrak was still accepting loads for the railcars under the Direct Lease, but not for the railcars under the Sublease.

On October 8, 2003, the Debtor filed in this Court a motion to assume the Operating Agreement, Sublease and Direct Lease. Amtrak objected and asserted that none of those contracts could be assumed because they were all terminated pre-petition. As such, they are not “executory” contracts and cannot be assumed under § 365(a) of the Bankruptcy Code. The Debtor countered that the contracts were not lawfully terminated pre-petition because Amtrak, through a course of performance, had waived its right to insist upon strict compliance with the payment dates set forth in the Leases. As a consequence, the Debtor argued that it was not in default of the Leases and, therefore, the Leases were not terminated pre-petition and could now be assumed by the Debtor under § 365(a).

On November 21, 2003, the Bankruptcy Court held a hearing regarding the Debtor’s motion to assume and a hearing regarding Amtrak’s motion for a determination that the automatic stay of § 362 was inapplicable to it. At the hearing, both the Debtor and Amtrak explained to the Bankruptcy Court the status of the litigation pending before the District Court. Both parties conceded that the District Court litigation encompassed all of the factual and legal issues that would be necessary for the Bankruptcy Court to adjudicate in order to determine whether the Operating

Agreement, Direct Lease and Sublease are executory contracts that can be assumed under § 365(a) of the Bankruptcy Code. Both parties also agreed that the District Court litigation encompassed other factual and legal issues including Amtrak's request for an award of damages against the Debtor and the Debtor's request for an award of damages against Amtrak for breach of contract. In response to questions from the Court, the Debtor's counsel expressed the Debtor's view that the District Court already had all of the issues before it that would be necessary for the Bankruptcy Court to adjudicate to rule upon the Debtor's motion to assume and that the District Court was better positioned to adjudicate those issues:

I don't think there's any doubt that all of the issues before this Court are also in these – and these two motions, the motion to assume and the motion by Amtrak, are also before the District Court in the District of Columbia.

As I said at the status conference, as I said in my pleadings, and I'll say it again today, ExpressTrak is willing to proceed with this litigation in that court. If Amtrak wants it there and the Court so rules, we have no objection.

As a matter of fact, it's probably a better place. The parties have already stated all of their claims in that case. The litigation will resolve the Debtor's damage claim against Amtrak, and Amtrak's damage claims against ExpressTrak based on the same facts as this Court is going to have to determine.

The parties have already agreed to a scheduling order in that case, which is going to be a bone of contention here. The parties have begun discovery in that case. That court does have some experience and knowledge of the case. The Debtor's special counsel is located in the District of Columbia, and they're going to try this case and it's going to be less expensive for the Debtor if it's there.

(Hr'g Tr. at 25, Nov. 27, 2003 (docket entry No. 138).)

Amtrak argued that the Bankruptcy Court could determine as a matter of law, based on the documents before it at the November 21, 2003 hearing, that the Operating Agreement, the Sublease and the Direct Lease were all terminated pre-petition and that no evidentiary hearing would be necessary. However, Amtrak asserted that if the Bankruptcy Court concluded that there were factual

issues that needed to be addressed in an evidentiary hearing to determine whether to grant or deny the Debtor's motion to assume, those factual issues could be compartmentalized from the other, more extensive issues in the District Court litigation and could be adjudicated by the Bankruptcy Court in an evidentiary hearing to be conducted within 30 days from November 21, 2003 hearing. The Debtor rejected that argument and maintained that a much longer schedule would be necessary even should the Bankruptcy Court determine to conduct its own evidentiary hearing. The parties also advised the Bankruptcy Court that a schedule for discovery and pre-trial motions had already been crafted by them and had been submitted to the District Court. That schedule called for trial to take place before the District Court in November, 2004 or, in other words, approximately one year from the date of the hearing on the Debtor's motion to assume and Amtrak's motion for relief from stay before the Bankruptcy Court in November, 2003. Although Amtrak argued that a compartmentalized evidentiary hearing could be conducted within 30 days with respect to only those issues necessary for the motion to assume, the Debtor insisted that a much longer time frame would be necessary even for that evidentiary hearing and that the Debtor's right to litigate all of the issues necessary for it to prosecute its motion to assume should not be truncated by the Bankruptcy Court. At the conclusion of the November 21, 2003 hearing, the Court took the Debtor's motion to assume and Amtrak's motion for relief from the automatic stay under advisement.

On January 20, 2004, the Court rendered its Opinion (1) Denying Amtrak's Motion for Determination That Automatic Stay Does Not Apply; (2) Staying Debtor's Motion to Assume Executory Contracts; (3) Modifying the Automatic Stay for the Limited Purpose of Permitting the Parties to Continue Litigation in the District Court for the District of Columbia; and (4) Granting Amtrak's Motion for Relief From Automatic Stay with Respect to the Bond ("Opinion"). The

Opinion denied Amtrak's motion for a determination that the automatic stay did not apply, but did modify the automatic stay for the limited purpose of permitting the parties to continue the litigation in the District Court. The Opinion also effectively stayed the Debtor's motion to assume pending the outcome of the District Court litigation or until further order of the Bankruptcy Court. The Opinion concluded by instructing the parties to prepare an order consistent with the Opinion. Because the parties could not agree on the form of an order, the Court held a hearing on February 27, 2004. Afterward, the Court entered its order Order (1) Denying Amtrak's Motion for Determination That Automatic Stay Does Not Apply; (2) Staying Debtor's Motion to Assume Executory Contracts; (3) Modifying the Automatic Stay for the Limited Purpose of Permitting the Parties to Continue Litigation in the District Court for the District of Columbia; and (4) Granting Amtrak's Motion for Relief From Automatic Stay with Respect to the Bond ("Order").

The Opinion found that there were disputed issues of fact that would have to be resolved in order to adjudicate the Debtor's motion to assume the Operating Agreement, Direct Lease and Sublease. The Court rejected Amtrak's assertion that the motion could be denied as a matter of law based upon the documents before the Court at the November 21, 2003 hearing. Having concluded that an evidentiary hearing would be necessary to adjudicate the Debtor's motion to assume, the Court considered the positions of the parties as articulated at the hearing with respect to both the appropriate forum for conducting that evidentiary hearing and the time frame in which to conduct it. In reaching its conclusion that the District Court was the appropriate forum to adjudicate the rights of the parties under the Operating Agreement, Direct Lease and Sublease, the Court reasoned as follows:

The real question in this case, however, is not whether the Court *can* conduct an evidentiary hearing and provide for discovery, but rather whether it *should* do so

in light of the fact that there is a pending lawsuit in the District of Columbia District Court between Amtrak and the Debtor that encompasses the same issues as would be addressed by this Court in the context of an evidentiary hearing on the Motion to Assume. Although neither party specifically requested relief from the stay in their motions in order to continue the litigation in District Court, at the hearing, the Debtor acknowledged that all of the issues before this Court relating to the two motions are also before the District Court. The Debtor stated its willingness to have those issues adjudicated in that forum, and to return to this Court for enforcement of any judgment. On the other hand, Amtrak agreed to return to District Court only if this Court first determined that the stay did not preclude Amtrak from terminating services as to the remaining railcars.

...

After reviewing the arguments of the parties and the pleadings in the District Court case, the Court concludes that there are substantial reasons that dictate that the parties litigate their dispute in the District of Columbia District Court rather than commence and conduct a duplicative proceeding before this Court.

First, as explained above, it is the Court's view that there are genuine and substantial issues of fact that will need to be adjudicated in order to render a decision as to whether or not Amtrak terminated the Operating Agreement and Leases prepetition. However, conducting discovery and litigating the factual issues regarding the course of performance or course of dealing between the parties under the Operating Agreement and the Leases will be duplicative of the proceedings in the District Court for the District of Columbia. Parallel litigation over the Operating Agreement and Leases in two forums is not sensible and will not provide a benefit to the Debtor's estate and its creditors. Judicial economy dictates that only one proceeding be conducted to litigate these issues.

Second, if there is only going to be one proceeding to litigate these issues, it is generally the second court which will stay its action and defer to the court where the matter was first filed. In this case, the litigation between Amtrak and the Debtor over the Operating Agreement and the Leases commenced in the District Court for the District of Columbia on September 9, 2002, more than a year before the Debtor filed the Motion to Assume.

Third, not only was the action in the District Court for the District of Columbia commenced over a year in advance of the Motion to Assume, but the litigation between the parties that has taken place in that court has been extensive. On December 5, 2002, the United States District Court for the District of Columbia issued an opinion regarding the arbitrability of the disputes between Amtrak and the Debtor. After issuing that opinion, the District Court subsequently conducted an evidentiary hearing on January 27, 2003. Among other evidence, the Court heard

testimony regarding the Debtor's financial condition and the expenses incurred by Amtrak in the continuation of its business with the Debtor under the Operating Agreement and the Leases. That hearing led to an order entered by the District Court on March 11, 2003. On May 1, 2003, the District Court issued a Memorandum Opinion regarding the continuation of business between Amtrak and the Debtor and regarding the Bond that the District Court had ordered to be posted by the Debtor. In the Memorandum Opinion, the Court also observed that "this matter has amassed an extensive history that has unfolded through a number of filings and a series of hearings before this Court." On June 6, 2003, the United States Court of Appeals for the District of Columbia issued its opinion regarding the arbitrability of the disputes between Amtrak and the Debtor. That decision reversed the ruling of the District Court in which it compelled arbitration and, among other things, "remand[ed] the case to the district court for trial on Amtrak's breach claims." After the remand by the Court of Appeals, Amtrak and the Debtor continued the prosecution of their litigation before the District Court for the District of Columbia. They submitted discovery requests, which remain outstanding. Amtrak filed a First Amended Complaint on September 15, 2003, and the Debtor filed an Answer and Counter Claim on September 25, 2003. The issues have been joined before this Court by only a Motion to Assume and the Amtrak Motion. However, there have been complaints, answers, counter claims, affirmative defenses and various other pleadings filed in the District Court for the District of Columbia, which have more comprehensively joined the issues between the parties.

... Discovery has already commenced and the parties have already submitted proposed schedules for discovery to the District Court. With the substantial pleadings that have been filed, and hearings having been conducted and opinions having been written by the District Court for the District of Columbia, it is clear that the District Court has already invested a substantial amount of time and energy in becoming familiar with the factual and legal issues surrounding the dispute between Amtrak and the Debtor. Judicial economy does not dictate that this Court duplicate those efforts to reinvent the wheel and gain such familiarity.

Fourth, as pointed out at the hearing on November 21, 2003, both Amtrak and the Debtor have their primary trial counsel concerning the disputes between them located in Washington, D.C. Conducting the litigation in the District Court for the District of Columbia will produce a savings in the expense of the litigation for both parties.

Fifth, the Court of Appeals for the District of Columbia Circuit has already held that "section 30 of the Sublease applies to 'any litigation with respect to any matter related to this lease or the [O]perative [D]ocuments.'" Section 30 of the Sublease reads in its entirety as follows:

LESSOR AND LESSEE EACH WAIVE ALL RIGHTS TO A

TRIAL BY JURY IN THE EVENT OF ANY LITIGATION WITH RESPECT TO ANY MATTER RELATED TO THIS LEASE OR THE OPERATIVE DOCUMENTS, AND LESSOR AND LESSEE EACH IRREVOCABLY CONSENT TO THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND IN THE EVENT SUCH FEDERAL COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION THE COURTS OF THE DISTRICT OF COLUMBIA IN CONNECTION WITH ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS LEASE OR THE OPERATIVE DOCUMENTS.

This provision clearly demonstrates that when the parties negotiated the Sublease, and each had the opportunity to bargain for and express their choice of forum, they each chose the District Court for the District of Columbia to resolve any disputes arising under the Sublease. The Court considers this choice by the parties to be an important ingredient in determining which of two courts should conduct the litigation regarding the disputes between Amtrak and the Debtor.

Sixth, the parties each agreed at the hearing on November 21, 2003 before this Court and in their memoranda of law that the applicable law to determine whether the Operating Agreement and the Leases were terminated pre-petition is the law of the District of Columbia. In asserting its defense of course of performance, the Debtor relies primarily upon Article 2A of the Uniform Commercial Code as it is enacted in the District of Columbia and interpreted by District of Columbia courts. This fact too militates in favor having the disputes between Amtrak and the Debtor adjudicated by the District Court for the District of Columbia.

Seventh, adjudication of the Motion to Assume by this Court may result in only a partial resolution of the issues between these parties. For example, Amtrak's First Amended Complaint in the District Court for the District of Columbia seeks an award of damages against the Debtor. Similarly, the Debtor's Answer and Counterclaim seek an award of damages against Amtrak for breach of contract. Adjudication of the Motion to Assume by this Court would only provide partial resolution of the issues between the parties and would leave unresolved their respective claims for damages against each other. In contrast, litigation before the District Court for the District of Columbia can resolve all issues between the parties.

On balance, the Court concludes that there are numerous and substantial reasons why the litigation between Amtrak and the Debtor should be conducted in one forum.

(Opinion at 13-18 (docket entry No. 152) (citations omitted).)

As explained in the Opinion, the Court then modified the automatic stay to permit Amtrak and the Debtor to continue to prosecute the litigation in the District Court, including any claims and counter claims, and, as stated in the Order, held the Debtor's motion to assume in abeyance pending the outcome of the District Court litigation "or further order of this Court."

After the Court rendered the Opinion and Order, the Debtor continued to operate as debtor in possession. Although there were some adversary proceedings filed by the Debtor to assist in collection of accounts receivable, the Chapter 11 case for the most part became relatively quiet while Amtrak and the Debtor concentrated their efforts on the District Court litigation. However, in order to monitor progress on the District Court litigation and its effect on the Debtor's Chapter 11 case, this Court scheduled Chapter 11 status conferences from time to time. Status conferences in this case were held on April 5, 2004, September 20, 2004, March 21, 2005, October 17, 2005 and February 27, 2006. At each of these conferences, both the Debtor and Amtrak advised this Court of the status of the District Court litigation and acknowledged that their estimates on November 21, 2003 of the schedule for the District Court litigation to conclude had proven overly optimistic. Part of the explanation was because of requests made by the Debtor and Amtrak to postpone the District Court litigation. According to the memorandum filed by the Debtor in support of the motion now before the Court (docket entry No. 502), there have been numerous motions filed in the District Court both by the Debtor and by Amtrak seeking to extend the dates and deadlines in the District Court litigation. According to the Debtor's memorandum, the Debtor filed six separate joint motions with Amtrak seeking to postpone dates in the District Court litigation on July 8, 2004, November 23, 2004, March 8, 2005, June 2, 2005, December 7, 2005 and February 3, 2006. In addition to the joint motions that the Debtor has filed with Amtrak, Amtrak itself has filed at least

one other motion on its own to “suspend the scheduling order and extend all dates,” and the District Court on at least two occasions has sua sponte vacated scheduling orders to extend dates. As a result, the District Court litigation today has not yet been concluded nor is there currently a trial date set. Nevertheless, at no time during any of the Chapter 11 status conferences in this Court did either the Debtor or Amtrak request any relief from the Opinion and Order entered by this Court, nor express a desire to do anything other than complete the District Court litigation, whatever the schedule.

While the District Court litigation has continued for the last two and one-half years, and the Debtor continued to operate in Chapter 11, the Debtor has filed in the Bankruptcy Court ten separate motions to extend its exclusivity period to file a plan and to obtain confirmation of its plan. In each of these motions, the Debtor cites as the reason for the extension of exclusivity the “complex litigation with Amtrak” pending in the District Court. Amtrak for its part seems to have agreed with the Debtor that the “complex litigation” between it and the Debtor has thus far provided sufficient cause to extend the exclusivity period because, for the first nine motions that were filed by the Debtor, Amtrak did not object. Because no party objected to the first nine motions seeking an extension of exclusivity, because the Court was satisfied that the “complex litigation” in the circumstances of this case did provide adequate cause to extend the exclusivity period, and because the Court had no reason to believe that any creditor was prejudiced by such extension, the Court granted the Debtor’s first nine motions. The last of the orders granting these uncontested motions was signed on January 25, 2006 (docket entry No. 397).

On June 2, 2006, the Debtor filed its motion for a tenth extension (docket entry No. 441). This motion seeks to extend the Debtor’s exclusivity period to file a plan of reorganization through

October 5, 2006 and the Debtor's exclusivity period in which to obtain confirmation of its plan through December 5, 2006. This time Amtrak objected vigorously. Amtrak filed a response to the motion (docket entry No. 453) and the Debtor filed a reply to that response (docket entry No. 502). In its reply, the Debtor modified its requested relief. Instead of requesting a tenth extension of exclusivity to file a plan through October 5, 2006, the Debtor now requested only that the extension of exclusivity to file a plan be granted through July 31, 2006, but that the extension of exclusivity to obtain confirmation of a plan be extended "to a date that is ninety days after the entry of a final order" in the District Court litigation and any subsequent appellate proceedings. On July 31, 2006, immediately before the Court conducted the scheduled hearing on the Debtor's motion that day, the Debtor filed a combined plan and disclosure statement (docket entry No. 506). The plan makes it clear by its definitions of "final order" and "litigation" that the Debtor had modified its request to extend the exclusive period to obtain confirmation of a plan until ninety days after the conclusion of all of the Debtor's litigation with Amtrak, including the exhaustion of any rights to appeal, seek rehearing or certiorari. Although reducing its request for the extension of exclusivity to file a plan to July 31, 2006, the Debtor was now asking for an indefinite, open ended extension of exclusivity to obtain confirmation of a plan. At the conclusion of the July 31, 2006 hearing on the Debtor's motion, the Court took the matter under advisement. Despite such fact, and without leave of the Court, the Debtor filed a post-hearing brief (docket entry No. 513) in further support of its motion on August 2, 2006, although there is no Bankruptcy Rule or Local Bankruptcy Rule that permits the filing of a post-hearing brief when a matter is under advisement.

IV. Applicable Legal Standard

Prior to BAPCPA, § 1121(b) provided that only a debtor may file a plan until after 120 days

from the date of the order for relief under Chapter 11. If the debtor filed a plan of reorganization within 120 days after the order for relief, the debtor would then have an additional 60 days (i.e., or up to 180 days) after the order for relief to obtain acceptances of the plan before any other party in interest may file a competing plan. Section 1121(d) of the Bankruptcy Code provided that this 120 day exclusivity period could be extended or shortened:

On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

11 U.S.C. § 1121(d).

Although there is no controlling case in the Sixth Circuit regarding what constitutes “cause” for purposes of § 1121(d), there are several lower court opinions that have addressed the issue. In re Lake in the Woods, 10 B.R. 338 (E.D. Mich. 1981), a case decided shortly after the Bankruptcy Code became effective, an appeal was taken from a bankruptcy court order granting a seventh extension of exclusivity. The basis on which the debtor requested the seventh extension was its assertion that there existed a dispute over title to the land on which the debtor’s business was located. According to the debtor, this title issue required judicial construction of the financing arrangement between it and certain creditors. The bankruptcy court found that there was a bona fide dispute over the title and granted the debtor’s requested extension, contingent upon the debtor filing a complaint for declaratory judgment regarding the title issue within a time specified by the bankruptcy court. On appeal, the district court reversed the Bankruptcy Court’s finding that cause existed for the extension requested by the debtor under § 1121(d). The district court reviewed the legislative history to § 1121(d) and concluded that it was “erroneous as a matter of law” for the bankruptcy court to hold that the dispute over title to real estate between the parties constitutes cause

to extend the debtor's exclusive period in which to file a plan.

While this court need not go beyond the facts of the appeal presented to structure an all-encompassing definition of cause under Section 1121(d), it does hold that extensions are impermissible if they are for the purpose of allowing the debtor to prolong reorganization while pressuring a creditor to accede to its point of view on an issue in dispute. The bankruptcy court's finding in this case has precisely this impermissible affect.

Id. at 345-46.

In In re Dow Corning Corp., 208 B.R. 661 (Bankr. E.D. Mich. 1987), the committee of unsecured creditors filed a motion under § 1121(d) seeking to terminate the debtor's exclusivity period. In that case, the bankruptcy court had previously granted the debtor extensions of its exclusivity period on two occasions. In the most recent order, the court had extended the debtor's exclusivity period to file a plan until 21 days after the court ruled upon the competing estimation motions that were pending before the court, and extended the time for the debtor to seek acceptances of that plan until "further order of the Court." The court began its analysis by noting that the party moving under § 1121(d) has the burden of proof to show the existence of cause because it is seeking to change the status quo. Id. at 663. The court also observed that, "[i]n this Court's opinion, the Debtor's burden gets heavier with each extension it seeks as well as the longer the period of exclusivity lasts; and a creditor's burden to terminate gets lighter with the passage of time." Id. at 664.

The Dow Corning court then reviewed other bankruptcy cases that have identified certain factors to consider in deciding whether on the one hand to extend or on the other hand to terminate a debtor's exclusivity period. The Dow Corning court then applied the factors considered by the court in In re Express One International, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996). Those factors listed by the Dow Corning opinion are as follows:

1. the size and complexity of the case;
2. the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
3. the existence of good faith progress toward reorganization;
4. the fact that the debtor is paying its bills as they become due;
5. whether the debtor has demonstrated reasonable prospects for filing a viable plan;
6. whether the debtor has made progress in negotiations with its creditors;
7. the amount of time which has elapsed in the case;
8. whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and,
9. whether an unresolved contingency exists.

Id. at 664-65.

After a thorough analysis of each of the factors, the Dow Corning court denied the committee's request to terminate the debtor's exclusivity. In reaching its conclusion, the court also pointed out that there is another consideration in addition to adding up the factors.

When the Court is determining whether to terminate a debtor's exclusivity, the primary consideration should be whether or not doing so would facilitate moving the case forward. And that is a practical call that can override a mere toting up of the factors. In this case, that overriding factor weighs heavily against granting the motion.

Id. at 670.

Absent controlling authority in this circuit regarding what constitutes cause, both the Debtor and Amtrak urge the Court to examine the Dow Corning factors. Although agreeing that these factors provide the relevant criteria to determine cause, the parties part ways on the application of the factors in this case.

V. Analysis

The first of the Dow Corning factors is the size and complexity of the case. The Court agrees with Amtrak that this is not a particularly large or complex case. The Debtor operates a single

business through a single legal entity with no public debt or bank debt to restructure. There is no creditor committee and there are few, if any, contracts or leases other than those with Amtrak. Other than Amtrak, the aggregate amount of the claims of creditors listed by the Debtor in this case is \$2,847,645. There are no complex labor, competitive or regulatory issues for the Debtor to address in order to propose a plan of reorganization. This factor does not support a finding of cause.

The second factor is whether the Debtor has had sufficient time to negotiate a plan of reorganization and prepare adequate information. The Chapter 11 case is nearly three years old. It is the oldest Chapter 11 pending on this Court's docket without a confirmed plan. There has been, by any standard, sufficient time to permit the Debtor to negotiate a plan of reorganization with Amtrak and its creditors. Further, there has been sufficient time to prepare adequate information as evidenced by the fact that the Debtor has now filed a plan of reorganization with a combined disclosure statement. No suggestion has been made by the Debtor that it needs additional time to assemble information to be included to make the information in its disclosure statement adequate. This factor does not support a finding of cause.

The third factor consists of the existence of good faith progress toward reorganization. The Debtor asserts that it has diligently prosecuted the District Court litigation. Amtrak does not contest this fact. However, a review of the events in that litigation, as described by the Debtor in its memorandum in support of its motion (docket entry No. 502) reveals that both the Debtor and Amtrak have made numerous requests in the District Court to postpone scheduled court dates and extend deadlines for conducting discovery and conducting other pre-trial actions. As noted earlier in this opinion, by the Debtor's own count, it has filed six separate joint motions with Amtrak requesting postponements of dates and deadlines in the District Court litigation. The Debtor's

reliance on its efforts to prosecute the District Court litigation and its assertion that resolution of this litigation is essential for it to file the plan of reorganization that it desires to file is undermined greatly by the Debtor's own requests in that litigation to continue to postpone and delay it. On the other hand, it does not appear to this Court that Amtrak is well positioned to complain about the lack of progress in the District Court litigation because Amtrak, in addition to signing and filing the six motions to postpone dates and extend deadlines that it jointly filed with the Debtor, also filed yet its own motion requesting that the District Court suspend its entire scheduling order and extend all due dates because of Amtrak's decision to replace its counsel in that case. Other than conducting the litigation in the District Court, it does not appear to this Court that there is any progress toward reorganization by the Debtor except for the filing by the Debtor of a combined plan of reorganization and disclosure statement, on the very day of the hearing on its tenth motion to extend. Without allocating responsibility one way or the other for the numerous requests to postpone the District Court litigation, the Court does not find that this factor supports the Debtor's statement that cause exists for its extension.

The fourth factor is whether the Debtor is paying its bills as they become due. This is a factor that the Court considers important. For its part, the Debtor asserts that it is paying all of its "undisputed bills as they become due" (docket entry No. 441, ¶ 21). Although not contesting that statement, Amtrak points out that the Debtor itself has admitted that it is unable to pay anywhere near the full amount of the professional fees that it has incurred with the Foley & Lardner law firm to prosecute the District Court litigation. On March 9, 2006, the Debtor filed a "supplement to Debtor's monthly statements" (docket entry No. 410). It states that "the Debtor's cash flow has not been sufficient to pay the Foley invoices in full." If there is any one fact that has changed in this

case, other than the timetable for the District Court litigation, since the first nine uncontested motions for extension of exclusivity were filed by the Debtor and granted by the Court, that fact consists of the information that has recently come to light regarding the Debtor's payment of administrative expenses for professional fees. After the Debtor filed its "supplement to Debtor's monthly statements" on March 9, 2006, Amtrak filed a motion for a Bankruptcy Rule 2004 examination on April 12, 2006 (docket entry No. 415) that requested permission of the Court to conduct an examination of the Debtor for the purpose of obtaining information regarding payments of professional fees to Foley & Lardner that were allegedly not made by the Debtor, but were instead made on behalf of the Debtor by an individual who is a principal of one of the members of the Debtor, and who has allegedly guaranteed the payment of fees to Foley & Lardner. At a hearing held with respect to Amtrak's motion for Rule 2004 examination on May 10, 2006, the Court learned that Anthony Soave, a principal of one of the members of the Debtor, has been paying legal fees incurred post-petition by the Debtor with Foley & Lardner without Foley & Lardner having filed a fee application with the Court for approval of such fees. Further, the Court learned that the fees paid by Mr. Soave to Foley & Lardner for post-petition services rendered by Foley & Lardner to the Debtor were paid by Mr. Soave because the Debtor did not have the funds with which to pay fees and expenses to Foley & Lardner as it was authorized to pay pursuant to this Court's order that authorized the Debtor to employ Foley & Lardner entered on November 4, 2003 (docket entry No. 88). Regrettably, the payments to Foley & Lardner by Mr. Soave and his alleged unauthorized reimbursement of some of these payments by the Debtor have spawned yet another front for litigation between Amtrak and the Debtor. Whatever may be the outcome of that litigation, the salient point for purposes of the Debtor's motion for a tenth extension of exclusivity is the

unequivocal acknowledgment by the Debtor that it is not paying, and does not have the funds to pay, the professional fees that it is incurring post-petition with Foley & Lardner. The fourth factor does not then support a finding of cause to grant the Debtor's motion.

The fifth factor consists of whether the Debtor has demonstrated reasonable progress for filing a viable plan. The Debtor asserts that the plan that it wants to file provides for it to continue to own and operate the business and therefore requires its assumption of the Operating Agreement, Direct Lease and Sublease. The Debtor's plan of choice then necessarily requires a determination of whether the Operating Agreement, Direct Lease and Sublease are executory contracts that can be assumed under § 365(a) of the Bankruptcy Code. The Debtor correctly observes that this plan is not viable unless the Debtor has favorably concluded the District Court litigation. Hedging its bet, however, the Debtor filed on the day of the hearing on its tenth motion to extend exclusivity, a plan of reorganization. However, the Debtor explains that this plan does not have an effective date until 90 days after the entry of a "final order" that concludes the District Court litigation. (Debtor's plan of reorganization, Article XII, Section 12.1(c) (docket entry No. 506).) Further, the Debtor explains that under Section 4.1 of its plan, the Debtor will have an option for 45 days after the entry of a "final order" concluding the litigation with Amtrak in which to elect to either proceed with the plan or "opt to liquidate." Because a "final order" is defined in Section 1.25 of the Debtor's plan of reorganization to mean an order that is no longer subject to appeal, rehearing or certiorari, the Debtor concedes that its plan will not have an effective date for a very long, and entirely unknown period of time. A plan with such a speculative and open ended effective date is not a viable plan for purposes of determining, under factor number five, whether the Debtor has established cause for its requested extension.

The sixth factor is whether the Debtor has made progress in negotiations with its creditors. The Debtor points out that it participated in a mediation of the District Court litigation with Amtrak on January 17, 2006, which was attended by counsel for the Debtor and Amtrak as well as representatives of each of them. The mediation was unsuccessful. The Debtor describes no other efforts that it has made to negotiate with Amtrak or any of its other creditors. Instead, the Debtor candidly refers to Amtrak as its “implacable adversary” in papers filed with this Court (Debtor’s Mem. (docket entry No. 527)). Moreover, the plan of reorganization that the Debtor filed on July 31, 2006 was admittedly not provided to Amtrak or any other creditor even in draft in advance of its filing. This factor does not support a finding of cause to grant the Debtor’s motion.

The seventh factor is the amount of time that elapsed in the case. Application of this factor in this case is complicated. On the one hand, there has been a substantial passage of time as this case is nearly three years old. On the other hand, the Debtor has filed nine previous motions to extend exclusivity, all of which were uncontested by Amtrak, the U.S. Trustee, or any other party. Further, both Amtrak and the Debtor have each requested numerous postponements of the District Court litigation. While at first blush three years for a Chapter 11 plan to be filed might by itself be fatal to the Debtor’s effort to extend exclusivity yet again, in the facts of this case, where there have been no previous objections to its extension, the Court has to dig deeper to look for the reasons for the amount of time that has elapsed. In this case, it is clear that these reasons are all related to the District Court litigation and the manner in which the Debtor and Amtrak have prosecuted it, as well as this Court’s decision set forth in its Opinion to not proceed with respect to the Debtor’s motion to assume executory contracts pending the outcome of the District Court litigation. When asked at the hearing why it consented to the first nine extensions of exclusivity but chose to object to the

tenth extension, Amtrak's reply was "enough is enough." While the Court shares Amtrak's (and the Debtor's) frustration with the long passage of time in the prosecution of the District Court litigation, far beyond any estimates provided by the parties to the Court at the hearing on November 21, 2003, the Court cannot hold the Debtor solely accountable for the length of time that has elapsed in this case. In the unusual circumstances of this case, the Court considers this factor neutral.

The eighth factor is whether the Debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the Debtor's reorganization demands. This factor does not help the Debtor. The Debtor has always been free to file a plan of reorganization. It could have filed at any time in the last three years a consensual plan of reorganization with Amtrak. It did not do so. It could have filed a plan that provides for the payment of all creditors and allows the Debtor to continue the District Court litigation post-confirmation with Amtrak. It did not do so. It could have filed a liquidating plan. It did not do so. On this point, the Debtor's post-hearing brief (docket entry No. 513 at 3) is clear: it wants to file *its* plan and *its* plan only. It does appear to the Court that the Debtor is seeking its extension to pressure a creditor, Amtrak, to submit to the Debtor's plan of choice. This factor does not support a finding of cause.

The ninth factor is whether there exists an unresolved contingency. To the Debtor, this is the paramount factor. The Opinion rendered by this Court stayed the Debtor's motion to assume pending the outcome of the District Court litigation. The reasons for that decision are sufficiently set forth in the Opinion and are extensively quoted above. At the time that the Court rendered that Opinion, the best information available to the Court, as provided by the Debtor and Amtrak, suggested that the outside time in which that District Court litigation would conclude would be eight months to a year. Both the Debtor and Amtrak now acknowledge that they had no way of knowing

in November, 2003 that nearly three years would pass and the District Court litigation would not be concluded. For purposes of this last factor, it is irrelevant what the reasons are for the delay in that litigation. The important point in the Debtor's view is its assertion that the Opinion prevented the Debtor from going forward with its motion to assume pending the outcome of the District Court litigation, or in other words, until the unresolved contingency was resolved. The Debtor says that to now deny it an extension of exclusivity is to punish it because this unresolved contingency has still not been resolved. The Debtor now cries foul that this Court stayed its motion to assume pending the outcome of the District Court litigation. Amtrak, on the other hand, argues that In re Lake in the Woods, 10 B.R. 338 (E.D. Mich. 1981) presents ample authority for the proposition that unresolved litigation is not a sufficient contingency as a matter of law to create cause to extend an exclusive period under § 1121(d). Before reaching a conclusion as to whether this factor helps or hurts the Debtor, a few things need to be said about the Court's Opinion and the predicament that the Debtor now finds itself in.

First, the Debtor is not accurate when it states in its reply (docket entry No. 502) that "this is a case that was effectively put on hold when this Court issued its Opinion and subsequent Order staying the Debtor's Assumption Motion." To the contrary, the Opinion allowed the Debtor to litigate the issues that it described as necessary for it to obtain a favorable ruling on its motion to assume in the District Court, the very forum that the Debtor urged this Court to accept as the better forum to adjudicate the issues necessary for the Debtor to file a plan based upon assumption of the Operating Lease, Direct Lease and Sublease. In contrast, it was Amtrak that argued on November 21, 2003 that the issues necessary to resolve the Debtor's motion to assume could be decided in a compartmentalized hearing in the Bankruptcy Court within a short time frame. The Debtor

prevailed at that time in persuading this Court that the District Court was the better forum to hear all of the issues together. Far from placing this case “on hold,” the Opinion allowed the Debtor to proceed to seek a full adjudication of all issues in its chosen forum while at the same time enjoying the protection of the automatic stay provisions of § 362 in this case.

Second, it is inexplicable to this Court that the Debtor would participate in requesting any extensions of time in the District Court litigation given the fact that it is the Debtor, and not Amtrak, that is in a Chapter 11 case and has the duty to file a plan of reorganization in the Chapter 11 case. If the Debtor needed to have the District Court adjudicate that the Operating Agreement, Direct Lease and Sublease had not been terminated pre-petition and were therefore executory contracts that could be assumed under § 365(a), in order for the Debtor to file the plan of reorganization that it desired to file, logic dictates that the Debtor would have been motivated to promptly prosecute the District Court litigation without delay, and to vigorously resist any request for extensions of time by Amtrak in the District Court litigation.

Third, the Order entered by this Court on February 27, 2004 stayed the Debtor’s motion to assume “pending the outcome” of the District Court litigation “or until further order of this Court.” As it became apparent to the Debtor that the District Court litigation was proceeding at a pace much slower and for a period that would take much longer to conclude than the Debtor and Amtrak had projected at the November 21, 2003 hearing, the Debtor has always been free to come back into the Bankruptcy Court and request that this Court reconsider its decision to refrain from hearing the Debtor’s motion to assume pending the outcome of the District Court litigation. When it became apparent that the process would take much longer than estimated by Amtrak and the Debtor, the Debtor could have sought the “further order of this Court” provided for in the February 27, 2004

Order. In the Debtor's brief in support of its motion, the Debtor suggests that it was "time barred" from seeking such relief, but that statement is belied by the terms of the February 27, 2004 Order itself, which simply stayed the motion to assume "pending the outcome" of the District Court litigation or until "further order of this Court."

Fourth, when the Debtor's motion to assume was stayed pending the outcome of the District Court litigation, there was no mention either by Amtrak or the Debtor of what impact, if any, this decision might have upon the Debtor's independent right of exclusivity under § 1121(d) of the Bankruptcy Code to file a plan of reorganization. Contrary to the suggestions made by the Debtor, neither Amtrak nor the Court somehow promised the Debtor that it would be free of competing plans being filed in this case while it litigated the issues that it needed to be resolved in order for the Debtor to file and confirm the plan that it desired to file and confirm.

Fifth, it is difficult for the Court to understand how any party will be prejudiced by denying the Debtor's extension of exclusivity. The Debtor, of course, is still free to file a plan. Even if Amtrak should file a competing plan, the rights of creditors and equity holders of the Debtor are protected and they will still have the opportunity to object to Amtrak's plan if the plan should somehow call for the liquidation of the Debtor without an assumption of the Operating Agreement, Direct Lease and Sublease. Amtrak's plan must still comply with all the requirements of § 1129, including the treatment of any equity holders.

In sum, the Opinion has neither prevented the Debtor from moving forward in this Chapter 11 case nor does it ensure an unlimited period of time for exclusivity while the Debtor prosecutes the District Court litigation. That said, the Court still must consider whether cause exists in this case to grant the Debtor's tenth extension. The Court has already reviewed the Dow Corning factors, 208

B.R. 661, 664-65 (Bankr. E.D. Mich. 1987), and generally finds that they do not support the Debtor's request. However, there are other facts and circumstances unique to this case that must also be considered.

The length of time for the District Court litigation has far exceeded any of the estimates of either Amtrak or the Debtor. Although there were substantial and sound reasons for allowing the District Court litigation to proceed before adjudicating the Debtor's motion to assume in this Court, and nothing in the record today contradicts those reasons, this Court may well have come to a different conclusion in the Opinion despite those reasons, if the parties and the Court had known how long the District Court litigation would actually take. The point here is that if there were valid reasons to allow the District Court litigation to be the forum to adjudicate the legal issues concerning the Operating Agreement, the Direct Lease and the Sublease, one can argue that those reasons are still equally valid today. That suggests that the Court should not shrink from the conclusion it reached in the Opinion simply because of the passage of time. On the other hand, by filing a plan on July 31, 2006, and modifying its request for an extension of the exclusivity period for an indefinite, open ended, ninety day extension after completion of all of its litigation with Amtrak, the Debtor now goes too far. It is true that Amtrak, the U.S. Trustee, and the creditors in this case have not opposed any of the nine previous extensions. However, each of those requested extensions had a finite period of time that the parties in interest could measure against and compare to the schedule in the District Court. Not so this open ended indefinite extension that the Debtor now requests. That is particularly true in this case where the record is entirely devoid of any evidence of the type of "hard bargaining" that courts generally expect debtors to engage in to earn or pay for extensions of their exclusivity period to formulate and gain acceptance of their plan. See In re Public Service Co.

of New Hampshire, 99 B.R. 155, 173 (Bankr. D.N.H. 1989). There is no evidence of any “hard bargaining” in this case, but only the continuation of the District Court litigation with the Debtor’s self-described “implacable adversary.”

In the final analysis, the Debtor’s sole basis for its tenth extension of exclusivity is the continuation of the District Court litigation. As discussed earlier in this opinion, generally speaking, the pendency of litigation as an unresolved contingency is not sufficient by itself to extend exclusivity. See In re Lake in the Woods, 10 B.R. 338 (E.D. Mich. 1981). That point seems even more compelling where the extension of exclusivity is requested until the conclusion of all litigation, including the exhaustion of all appeals, all appellate rights and certiorari. Whatever logic and reason may support the conclusions set forth in the Opinion, they do not support a request for exclusivity to gain acceptance of the Debtor’s plan for an indeterminate number of years going forward as the Debtor has now requested. The Debtor has not cited a single case that has ever approved such an indefinite, open ended extension. This Court will not be the first to break that ground, particularly in view of the strong policy to limit exclusivity as recently expressed by Congress in BAPCPA.

There are grounds for the Court to simply deny the Debtor’s request for all of the reasons set forth in this opinion. However, the Court does have some sympathy for the Debtor’s predicament. The Debtor after all did ask this Court to grant its motion to assume back at the beginning of this case. Obviously, that is a lot easier said than done, given all the legal and factual issues that the Debtor and Amtrak then went on to identify, all of which led to this Court’s decision to allow the District Court litigation to proceed. Given this fact, and considering that it was only on the tenth request for extension of exclusivity that Amtrak first raised any objection, the Court finds that there is sufficient cause in this case to grant the Debtor a limited, finite extension of the

exclusive period to file a plan until October 5, 2006 and the exclusive period to obtain confirmation of a plan until December 5, 2006. That is the time frame that the Debtor initially requested in its motion (docket entry No. 441), before it modified that request in a subsequent reply (docket entry No. 502) and at the July 31, 2006 hearing. Because the Court has had the Debtor's motion under advisement for fifty days, the Court will extend each of those deadlines by a like amount. The exclusive period to file a plan will be extended to November 24, 2006 and the exclusive period to obtain confirmation will be extended to January 24, 2007. However, the Court will not approve the modified, open ended request made by the Debtor both at the hearing and its reply (docket entry No. 502).

The Court appreciates the fact that it may be unlikely that the District Court litigation will conclude within the Debtor's exclusivity period as extended by this opinion. Nevertheless, the Court's decision to allow that litigation to proceed does not compel the Court to grant a parallel extension of exclusivity, no matter the length. The Debtor will have a chance to confirm a plan within this extended exclusivity period, or wait until the District Court litigation has concluded. However, this will be the last extension of exclusivity, irrespective of the status of the District Court litigation. The Debtor has been given two and one-half years already to try to resolve the District Court litigation, develop a consensual plan, or otherwise move forward with a plan of reorganization in this case. It has not done so. By obtaining this last, finite extension of exclusivity, the Debtor may still seek confirmation of a plan during its exclusivity period. If the Debtor is successful, so be it. If the Debtor is not, then it may still file and seek confirmation of a plan, but so may other parties. This Chapter 11 case has not produced a confirmable plan to date. Terminating exclusivity in these circumstances may well have the effect of moving this case forward. It is hard to see how

it could cause any further delay.

Accordingly, the Court grants in part and denies in part the Debtor's request to extend its exclusivity period to file a plan and to obtain confirmation of a plan. In light of this opinion, the Debtor is required to notify the Court if it intends to proceed to seek preliminary approval of the disclosure statement that it filed with its plan on July 31, 2006 or whether it intends to file an amended plan and disclosure statement. The Court will prepare its own order granting in part and denying in part the Debtor's motion.

NOT FOR PUBLICATION

Entered: September 20, 2006

/s/ Phillip J. Shefferly
Phillip J. Shefferly
United States Bankruptcy Judge